

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

UNPUBLISHED
May 15, 2018

v

KEITH LLOYD CANFIELD,

No. 340598
Livingston Circuit Court
LC No. 16-023443-FC

Defendant-Appellee.

Before: SHAPIRO, P.J., and M. J. KELLY and O'BRIEN, JJ.

PER CURIAM.

Defendant, Keith Canfield, was charged with three counts of first-degree criminal sexual conduct under MCL 750.520b on the basis of allegations that he sexually assaulted the complainant on multiple occasions between 2003 and 2007. The prosecution's case rested solely on the testimony of the complainant. However, because she failed to comply with the trial court's order compelling her to provide privileged records for an *in camera* review, her testimony was ultimately stricken. Accordingly, the prosecution could not proceed and the case was dismissed without prejudice. The prosecution appeals as of right. For the reasons stated in this opinion, we affirm.

I. BASIC FACTS

Canfield filed a pretrial motion for supplemental discovery, requesting that the trial court conduct an *in camera* review of (1) the complainant's counseling records from any counselors she had been involved with; (2) medical records from her pediatrician pertaining to the allegations in this case or other, similar allegations; (3) counseling records regarding the complainant's history of self-inflicted cuts and using medication (prescribed or otherwise); and (4) all medical records and counseling records pertaining to the complainant's desire to undergo a sex change. The trial court held that Canfield had made the necessary showing under MCR 6.201(C)(2) and *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994), to establish specific, articulable facts indicating that the privileged materials were necessary to prepare a defense. At the hearing on the motion, Canfield's lawyer requested that the court conduct an *in camera* review of the complainant's school records as well, which the trial court agreed to do. The trial court entered orders granting Canfield's motion with respect to the complainant's medical, counseling, and school records.

The prosecution filed an interlocutory application for leave to appeal the trial court's orders, which this Court denied "for lack of merit in the grounds presented."¹ The Michigan Supreme Court denied leave to appeal this Court's order.²

Several pretrial hearings followed, each solely concerning the production of the complainant's records. During each hearing, the prosecution indicated that it was working with the complainant to procure the documents, but the complainant continually failed to follow through. The trial court repeatedly adjourned the matter to allow the prosecution to obtain the necessary waivers and records from the complainant. At the eighth pretrial proceeding, the trial court set a firm deadline for the prosecution to produce the records. Thereafter, Canfield filed a motion to compel the prosecution to comply with the trial court's orders. A ninth pretrial hearing took place, and the trial court adjourned the matter one final time. Despite consistent, diligent efforts to obtain the records from the complainant, the prosecution was unable to procure the necessary documents, and the prosecution conceded that the records would not be produced in time to meet the court's deadline. At a tenth pretrial hearing, due to the complainant's continued failure to comply with the trial court's order, the trial court suppressed the complainant's testimony under MCR 6.201(C)(2)(a), stating that the complainant's refusal to supply the pertinent waivers and records to the prosecution functioned as a "de facto refusal to provide the records." Because the prosecutor was unable to proceed without the complainant's testimony, the trial court dismissed the charges against Canfield without prejudice under MCR 6.201(J).

II. DISCOVERY

A. STANDARD OF REVIEW

The prosecution argues that the trial court abused its discretion by granting an *in camera* review of the complainant's records and that the law-of-the-case doctrine does not bar consideration of this issue. Further, the prosecution contends that the trial court abused its discretion by suppressing the complainant's testimony and dismissing the case.

This Court reviews a trial court's determination on a discovery motion for an abuse of discretion. *People v Green*, 310 Mich App 249, 252; 871 NW2d 888 (2015). Likewise, this Court reviews the remedy fashioned by a trial court under MCR 6.201(J) for an abuse of discretion. *People v Jackson*, 292 Mich App 583, 591; 808 NW2d 541 (2011). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id.* Whether the law-of-the-case doctrine applies is a question of law that this Court reviews de novo. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001).

¹ *People v Canfield*, unpublished order of the Court of Appeals, entered January 20, 2017 (Docket No. 335542). Judge METER dissented, stating that he "would . . . grant the application for leave" *Id.*

² *People v Canfield*, 500 Mich 1009 (2017).

B. ANALYSIS

This Court's previous order denying leave to appeal for lack of merit in the grounds presented constitutes the law of the case, and the prosecution's renewed challenge to the trial court's decision to grant an *in camera* review is therefore barred. Under the law-of-the-case doctrine, "a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue." *Id.* Questions of law already decided by this Court cannot be decided differently in a subsequent appeal in the same case. *Id.* An order denying leave to appeal does not constitute the law of the case if it expressed no opinion on the merits of a particular claim. See, e.g., *People v Poole*, 497 Mich 1022 (2015); *Grievance Administrator v Lopatin*, 462 Mich 235, 260-261; 612 NW2d 120 (2000). However, this Court has explicitly held that the law-of-the-case doctrine applies to actions taken by reason of "lack of merit in the grounds presented." *People v Douglas*, 122 Mich App 526, 529-530; 332 NW2d 521 (1983). Further, contrary to the prosecution's assertion, Michigan courts have never required that a final disposition of the case occur before the law-of-the-case doctrine applies to a particular issue. Instead, what is required is that the merits of any single issue, itself, be decided, "either implicitly or explicitly, in the prior appeal." *Grievance Administrator*, 462 Mich at 260.³ Because this Court has already rejected the prosecution's claims that defendant failed to demonstrate a good-faith belief, grounded in articulable fact, that there was a reasonable probability that the victim's privileged records contained material information necessary to the defense, we decline to revisit the issue. See *Ashker*, 245 Mich App at 13. Moreover, even if this Court's previous decision on the merits of the prosecution's argument was in error, "the law of the case doctrine applies without regard to the correctness of the prior determination" *Grace v Grace*, 253 Mich App 357, 363-364; 655 NW2d 595 (2002).⁴

Having determined that an *in camera* review was warranted, we turn now to the prosecution's assertion that the trial court abused its discretion when it struck the complainant's testimony under MCR 6.201(C)(2)(a) and dismissed the charges against defendant under MCR 6.201(J). Trial courts generally have discretion to fashion appropriate remedies for discovery violations. *People v Rose*, 289 Mich App 499, 525; 808 NW2d 301 (2010). This involves a balancing of the interests of the courts, the public, and the parties. *Id.* Creating a remedy for noncompliance with discovery orders "requires inquiry into all the relevant circumstances, including 'the causes and bona fides of tardy, or total, noncompliance, and a showing by the objecting party of actual prejudice.'" *People v Davie (After Remand)*, 225 Mich App 592, 598; 571 NW2d 229 (1997) (citation omitted). Exclusion of a witness is ordinarily viewed as an

³ In any event, we have again reviewed the prosecution's contention that the trial court abused its discretion in ordering an *in camera* review of the requested materials and we have concluded that it lacks merit. Defendant supported his motion by articulating specific facts demonstrating his good-faith belief that the privileged records were likely to contain information necessary and relevant to the defense. See MCR 6.201(C)(2); *Stanaway*, 446 Mich at 681-683.

⁴ Despite our conclusion that law of the case applies, we have again reviewed the prosecution's argument and conclude that the trial court did not abuse its discretion by ordering an *in camera* review.

extreme sanction that should be employed only if the trial court is unable to fashion a different remedy that will limit the prejudice to the party injured by the discovery violation while still allowing the witness to testify. *Rose*, 289 Mich App at 526.

MCR 6.201(C)(2)(a), however, removes the trial court's discretion to fashion the appropriate remedy in a situation in which a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by absolute privilege are likely to contain material information necessary to the defense and where the privilege holder refuses to waive the privilege for that purpose. In such cases, MCR 6.201(C)(2)(a) mandates that the trial court "*shall* suppress or strike the privilege holder's testimony." (Emphasis added.) Use of the word "shall" usually indicates mandatory need for action or inaction. *People v Couzens*, 480 Mich 240, 250; 747 NW2d 849 (2008) (quotation marks and citation omitted). There is no requirement that defendant demonstrate actual prejudice under MCR 6.201(C)(2)(a). Here, the trial court ordered the records to be produced for an *in camera* review, and the complainant refused to produce the records despite a great deal of accommodation from the trial court. Thus, MCR 6.201(C)(2)(a) required the trial court to suppress or strike the complainant's testimony. With no evidence left on which to proceed, it was appropriate for the trial court to dismiss the prosecution's case under MCR 6.201(J).

Affirmed.

/s/ Douglas B. Shapiro

/s/ Michael J. Kelly

/s/ Colleen A. O'Brien